

OCA 86-2182  
23 June 1986

MEMORANDUM FOR THE RECORD

SUBJECT: Briefing of Congressman Hyde on the Legal, Statutory and  
Constitutional Authority for Covert Action

1. On June 23, 1986, pursuant to a request from Congressman Henry Hyde (delivered through Tom Smeeton, staff person on the House Foreign Affairs Committee), I briefed Mr. Hyde on the above subject. [REDACTED]

[REDACTED] Tom Smeeton was present during the briefing. I also supplied a copy of an unclassified legal memorandum entitled the "Constitutional, Statutory and Legal Basis for Covert Action," dated 24 October 1974, written by [REDACTED]. In addition, I gave him a document published by the American Bar Association entitled, "Oversight and Accountability of the U.S. Intelligence Agencies: An Evaluation," pages 19 to 25.

2. Initially, we discussed the Constitutional basis of covert action, which is derived from the President's summary powers on foreign policy. Early Constitutional law cases recognize the President as the sole organ of foreign policy. Next, I explained the additional and independent Executive branch authorities for covert action provided by the National Security Act of 1947. Appropriate reference was made to the legislative history of the 1947 Act. Another source of independent authority for covert operations I mentioned was the so-called doctrine of "congressional ratification." Over the years Congress has consistently appropriated money for covert action which, in itself, serves as an independent legal basis for covert action.

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5. Our discussion then turned to some practical arguments on why the President is the best suited and should conduct covert action: (1) covert action is a better way of meeting such action of hostile foreign governments; if we responded openly it would alert that country to the fact that we were on to their operations; (2) historically, up until 1970, Presidents had committed troops abroad no less than 125 times; the safety and security of our Republic is as much attributable to covert operations as it is to overt operations; (3) the President is the appropriate person, from a political policy standpoint, to sanction covert operations because he is the only public official elected by all the people; (4) if the President is not appropriate who is?

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Attachment

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OCA/Legislation,  (30 June 1986)

# Angola: <sup>WP</sup> Open Talk, Covert Aid

The president talks openly about providing covert assistance to rebels of the National Union for the Total Independence of Angola (UNITA), who oppose the Angolan government. But this policy cannot succeed or be sustained without the support of Congress, and at present the president's controversial plan does not have congressional approval.

Concern about a U.S. role in the Angola conflict dates from 1976, when CIA involvement in that war led Congress to pass the Clark Amendment prohibiting U.S. assistance to military and paramilitary groups in Angola. Last year Congress repealed the Clark Amendment. The administration supported this repeal as a means of restoring the president's flexibility in foreign affairs, but it neither proposed nor supported funding for UNITA at that time. It has since changed policy.

Under the law the president must notify the House and Senate intelligence committees of planned covert actions. The committees' approval is not required for the president to proceed with covert actions. The administration apparently decided to move forward with a plan to provide UNITA and its leader, Jonas Savimbi, with covert assistance this year despite Congress' reservations on this issue.

My principal objection to this plan is a procedural one. Covert authority is intended as a necessarily secret tool in support of existing policy, not a means to change policy in secret. In Angola the administration seems to be using its covert action authority to change policy dramatically and avoid public or congressional debate. Aiding UNITA is funding a war, one of the powers of Congress enumerated in the Constitution. The president should not be able to circumvent a public debate in Congress on a significant foreign policy decision by calling this aid by a different name.

Moreover, no serious effort has been made to preserve the secrecy of this policy change. The president, the vice president and other officials have confirmed it and disclosed details about the number and types of weapons to be provided. This action is no longer "covert" under any reasonable definition of that term. If the administration can talk about covert action openly, so should members of C

We need to resolve this procedural issue so that important, substantive questions can be debated. How will aid to UNITA serve U.S. interests? How will it affect Angolan dependence on Soviet and Cuban support, possibilities for a negotiated settlement in Namibia and U.S. credibility as an honest broker in southern Africa? How will it be viewed in black Africa? How will it affect substantial U.S. commercial ties with Angola?

These questions should not be avoided by simply notifying a handful of members on the intelligence committees. They are among the most serious issues for U.S. policy in Africa today. They deserve to be weighed by Congress as a whole. Legislation will soon come before the House which would restrict temporarily the president's authority to conduct covert action in Angola and require open acknowledgment and congressional approval of any proposal to aid UNITA.

The purpose of this bill is to strengthen U.S. policy in Angola, to ensure that it reflects American values and interests. Debate in Congress can help answer many of the questions concerning aid to UNITA and generate the political backing the president will need if he is to sustain any policy in Angola over time.

American foreign policy is most successful when the president and Congress cooperate. While the president needs flexibility in the implementation of foreign policy, Congress has a constitutional role to play in its formulation and review. That role must be respected if we are to have a sustainable policy in Angola that reflects U.S. interests.

*The writer, a Democratic representative from Indiana, is chairman of the House intelligence committee and ranking member of the Foreign Affairs Committee.*

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